UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOK, TELLITOCCI, and HAIGHT
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class CORNELIUS T. SUMMERS
United States Army, Appellant

ARMY 20121104

U.S. Army Medical Department Center and School
James L. Varley, Military Judge
Colonel Jeffrey C. McKitrick, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain James S. Trieschmann, Jr., JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major Steven J. Collins, JA; Captain Carling M. Dunham, JA (on brief).

26 March 2015

SUMMARY DISPOSITION

TELLITOCCI, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of disobeying a lawful order, maltreatment of a subordinate (four specifications), making a false official statement, abusive sexual contact, aggravated sexual contact, indecent acts (two specifications), forcible sodomy (two specifications), assault, and communicating a threat (two specifications), in violation of Articles 92, 93, 107, 120, 125, 128, and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 892, 893, 907, 920, 925, 928, and 934 (2006 & Supp. IV 2011; Supp. V 2012). The military judge sentenced appellant to a dishonorable discharge, confinement for fifteen years, and reduction to the grade of E-1. Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for three years, and reduction to the grade of E-1.

Appellant's case is now before us for review pursuant to Article 66, UCMJ. Appellant raised two assignments of error, one of which merits discussion but no relief. Appellant also personally raised matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have reviewed these matters and they do not merit discussion or relief.

BACKGROUND

The gist of appellant's first assignment of error is that he was denied his right to effective assistance of counsel based on his trial defense counsel's failure to discover, investigate, and raise issues of unlawful command influence (UCI). Appellant further alleges this UCI adversely impacted his ability to present favorable evidence during the sentencing portion of his case.

Following appellant's assignment of error, this court ordered appellant's trial defense counsel, Major (MAJ) PM and Captain (CPT) DM, to provide affidavits addressing appellant's allegations.

The issue of UCI was not raised at trial, but instead was first raised in a post-trial affidavit from Sergeant First Class (SFC) SM, a noncommissioned officer (NCO) assigned to appellant's unit. In his affidavit, SFC SM averred that Lieutenant Colonel (LTC) SD, appellant's battalion commander, made pretrial comments to the effect that she had already determined appellant's guilt and that she intended to send appellant to jail and kick him out of the Army.[1] Further, SFC SM averred that he was personally "chilled" by LTC SD's comments, and anyone else discussing this matter with the commander would have been similarly affected.

It is clear from the affidavits of both defense counsel that CPT DM was the attorney responsible for putting together appellant's sentencing case. Captain DM, in his affidavit, avers that he and appellant formulated a plan wherein appellant's spouse and two other witnesses would testify at the sentencing hearing in person or by telephone. The plan also included submitting character references and letters of support, eleven of which were obtained and submitted to the court. In fact, one of the letters was furnished by SFC SM. Many of the other letters were from other servicemembers in appellant's career field, and at least one other was from a member of appellant's unit at the time of his offenses. Captain DM further stated in his affidavit that there was no indication from appellant or SFC SM regarding a desire by either to have SFC SM testify in person in lieu of his written support.

[1] In fact, LTC SD acted as the accuser when she personally preferred charges in appellant's case.

LAW AND DISCUSSION

Claims of ineffective assistance of counsel are governed by the two-part test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* requires an appellant to demonstrate: (1) that his counsel's performance was deficient; and (2) that this deficiency resulted in prejudice. *Id.*

In order to succeed in his claim of ineffective assistance of counsel in this case, appellant must initially establish that there was a colorable claim of UCI for his attorneys to have investigated and raised.

Article 37(a), UCMJ, prohibits UCI. Witness interference can constitute UCI. *See United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010); *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004); *United States v. Stombaugh*, 40 M.J. 208, 212-13 (C.M.A. 1994); UCMJ art. 37.

On a UCI claim on appeal, appellant must first establish: "(1) facts, which if true, constitute [UCI]; (2) that the proceedings were unfair; and (3) that the [UCI] was the cause of the unfairness." *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013) (citation omitted). "[T]he initial burden of showing potential [UCI] is low, but is more than mere allegation or speculation." *Id.* (citing *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)). Specifically, appellant must show "some evidence" of UCI. *Id.* In addition, allegations of UCI are reviewed for actual UCI as well as the appearance of UCI. *Id.*

Our superior court has further held that "prejudice is not presumed until the defense produces evidence of proximate causation between the acts constituting [UCI] and the outcome of the court-martial." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Reynolds*, 40 M.J. 198 (C.M.A. 1994)).

The specific allegations of unlawful influence arise from statements purportedly made by the battalion commander to SFC SM. These comments are alleged to have happened in a one-on-one meeting between the commander and SFC SM upon SFC SM's arrival at the unit. In his affidavit, SFC SM alleges that LTC SD identified the appellant as a sexual predator, discussed details of appellant's misconduct, and made it clear that she intended to put appellant in jail and see that he was separated from the service.

There are no claims by appellant that he desired to call SFC SM at his presentencing hearing. In fact, although SFC SM alleged that anyone else hearing similar comments from LTC SD would have been similarly chilled, appellant has failed to produce any evidence whatsoever that *any* potential sentencing witnesses

were chilled.[2] Because SFC SM provided a supportive letter for use during the sentencing proceedings, it is illogical to now claim that SFC SM was somehow influenced not to provide the defense-favorable testimony that he, in fact, did provide. At least one other member of appellant's unit submitted a letter of support, and numerous other NCOs and senior officers in appellant's relatively small career field also submitted letters.

Having thoroughly reviewed appellant's claim, relying on the factors established in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), we conclude that a fact-finding hearing is not necessary.[3] There is no conflict between the affidavits

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[2] Appellant did not submit his own affidavit or sworn statement in support of his ineffective assistance of counsel claim.

[3] The five factors set forth in *Ginn*, 47 M.J. at 248, are as follows:

> First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis.
>
> Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.
>
> Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.
>
> Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.
>
> Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record . . . unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

submitted by the parties and there is nothing in the record or the affidavits that indicate that appellant sought live testimony from SFC SM.

Contrary to the allegations in appellant's brief, there is no evidence his ability to call witnesses was impeded to even the slightest degree by any command action. Any claims to the contrary are merely speculative in nature. As such, we do not find that appellant has met his burden to show that his proceedings were unfair, let alone establish that any unfairness was caused by UCI.

There must be more than command influence "in the air" to justify action by an appellate court. *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991) (citations omitted). Since there is no colorable claim of UCI, there is no support for appellant's claim that his counsel were ineffective.

CONCLUSION

On consideration of the entire record, and the assigned errors, to include those matters personally raised by appellant pursuant to *Grostefon*, 12 M.J. 431, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Senior Judge COOK and Judge HAIGHT concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court